NO. 12343

In The

UNITED STATES COURT OF APPEALS

For The Ninth Circuit

ANGUS J. DE PINTO,

Appellant,

v.

HJALMAR D. LANDOE, FRANCIS I. SABO, and EDWIN B. PEGRAM,

Appellees,

OPENING BRIEF OF APPELLANT, ANGUS J. DE PINTO

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(For convenience, the individual parties will be referred to by their last names. Provident Security Life Insurance Company will be referred to as "Provident". United Security Life will be referred to as "United". American Security Investment Company will be referred to as "American". "T.R." refers to Transcript of Record; "R.T." refers to Reporter's Transcript.)

Jurisdiction

This action originated in the United States District

action. Jurisdiction was based on 28 U.S.C.A. Sec. 1332. From adverse judgments upon his cross-claim against his co-defendants, Sabo, Pegram and Landoe, DePinto instituted this appeal pursuant to Rule 73 of the Federal Rules of Civil Procedure. 28 U.S.C.A. Sec. 1291 grants to this Court jurisdiction to review the judgments of the lower court.

Statement of the Case

This action was instituted by one John S. Gorsuch again DePinto, Sabo, Pegram, Landoe and others, for the purpose of recovering, among other things, the value of assets of United which had been transferred by it to American on or about October 18, 1957, in exchange for 30,800 shares of American's stock. The history of the litigation is found in the opinions of this Court: Niesz v. Gorsuch, 295 F.2d 909; DePinto v. Provident Security Life Ins. Co., 323 F.2d 826; and DePinto v. Provident Security Life Ins. Co., 374 F.2d 37.

After the first appeal, new parties entered the case and new pleadings were filed, including a cross-claim by DePinto against his co-defendants, James D. Kelly, L. N. Kelly, American Security Investment Company, Roslyn B. Croydon, Vernon B. Niesz, John D. Ballantyne, Edwin B. Pegram, Francis I. Sabo, Hjalmar B. Landoe and United Finance Corporation. (T.R. 22) The cross-claim alleged:

> "The loss or damage to United Security Life as alleged in plaintiff's Complaint was proximately, directly and primarily caused by the wrongful, willful and inten-

and was not aware that such acts were contemplated or intended. Any liability of cross-claimant for the alleged loss or damage to United Security Life (which Cross-claimant denies) is vicarious or secondary as compared with the primary liability of cross-defendants."

After the second appeal, the trial Court entered an order severing the cause as to the remaining defendants, Sabo, Pegram and Landoe, and ordered that the case would proceed to trial against DePinto as the sole defendant. (T.R. 183) After trial, judgment was rendered against DePinto and in favor of Provident in the amount of $314,794.19. (T.R. 184) Upon a third appeal, this judgment was affirmed. Thereafter, DePinto moved that his cross-claim be set for trial. (T.R. 189) Landoe then filed a Motion for Summary Judgment on the cross-claim, which was followed by a similar motion on behalf of Sabo and Pegram. (T.R. 128, 136) These motions were granted and judgments were entered dismissing DePinto's cross-claim as to the defendants Sabo, Landoe and Pegram. (T.R. 139-143) With reference to such judgments, and on August 31, 1967, the trial Court entered an order reading:

"The Court has found there is no just reason for delay and hereby makes express determination thereof. It is so ordered and the orders and judgments above referred to shall be final and not subject to revision pursuant to F.R.C. P. 54(b). It is

further hereby ordered that each of the orders and judgments above referred to shall be deemed amended to include the express determination as hereinabove provided." (T.R. 150)

On September 18, 1967, DePinto filed his amended Notice of Appeal from the judgments dismissing his cross-claim as to the defendants Landoe, Sabo and Pegram and the order entered on August 31, 1967. (T.R. 151)

Questions

The questions involved in this appeal are as follows:

1. Does an order dismissing a cross-claim (and upon which no judgment is entered) become the law of the case and res judicata, where the judgment entered on plaintiff's complaint is reversed and where the appellate court decides that it will not be necessary to discuss the questions raised by the cross-claim until there have been further proceedings in the trial Court?

2. Does the record herein disclose that there is no genuine issue as to any material fact and that, as a matter of law, DePinto was not secondarily liable for the loss sustained by United as the result of the transfer of its assets to American, as compared to the primary liability of Sabo, Pegram and Landoe and that, therefore, DePinto is not entitled to indemnity from Sabo, Pegram and Landoe?

Specification of Error

The trial Court erred in granting the motions of Sabo, Pegram and Landoe for summary judgment and in entering judgments dismissing DePinto's cross-claim as to them for the reason that:

(a) The pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits (testimony taken at the trial), do not show that there is no genuine issue as to any material fact and that Sabo, Pegram and Landoe were entitled to judgment as a matter of law.

(b) The action of the trial Court in previously dismissing the cross-claim was not res judicata, or the law of the case.

(c) Under the law of the State of Arizona, DePinto, as a party secondarily liable, is entitled to indemnity from Sabo, Pegram and Landoe as the parties primarily liable for the loss sustained by United as a result of the transaction of October 18, 1957.

Argument

1. DePinto's Crossclaim Not Foreclosed by Prior Proceedings.

In granting the motions of Sabo, Pegram and Landoe for summary judgment on DePinto's cross-claim, the trial Court pointed out that an order dismissing the cross-claim had been entered prior to the second appeal; that DePinto had assigned such ruling as error; that the ruling was not held erroneous by the Court of Appeals, although the judgment appealed from was reversed on other grounds and new trial ordered, and that, therefore, the dismissal of DePinto's cross-claim "has become the law of the case and is

res adjudicata." (T.R. 140, 142) Apparently, the trial Court relied upon the statement of Professor Moore in 1B J. Moore, Federal Practice, at 2231, reading:

> "A judgment may, however, be reversed by an appellate court on a single ground, and remanded with other determinations of the trial court left intact. In such a case, the unreversed determinations of the trial court are generally adhered to on remand; but this is an application of the doctrine of law of the case, rather than res judicata or collateral estoppel."

The trial Court completely overlooked the fact that in its opinion this Court did not leave "intact" numerous rulings of the trial Court which were attacked upon the appeal. This Court stated, commencing at page 838 of 323 F.2d:

> "There are also certain other questions presented on this appeal.[31] But they are not of a kind which requires decision now in order to provide guidance as to the remanded proceedings. Nor will they be presented here again unless plaintiff prevails in the further proceedings and then only if the judgment is of the same kind as that which is before us on this appeal. If these questions do arise again, they can best be dealt with on the record for that appeal."

"[31] We refer to the questions of whether the judgment is excessive as to DePinto and Duhame to the extent of 38.79% because of the cancellation of American's stock held by United; whether the judgment is excessive as to DePinto in the amount of six per cent because of Duhame's ownership of certificates of contingent interest; whether Provident is entitled to six per cent interest on the award from October 18, 1957; and whether DePinto and Duhame are entitled to indemnity against Pegram, Sabo, Landoe and certain other defendants."

In the light of the above-quoted statement, it is quite clear that this Court had no intention of foreclosing the issue raised by DePinto's cross-claim.

2. Record Does Not Support Summary Judgment.

In granting the motions for summary judgment, the trial Court stated:

"The court is fully satisfied the above-quoted ruling (the previous order granting the motion to dismiss the counter-claim) was sound under Arizona law and the facts shown of record at the time it was made. Any conceivable doubt has been removed by the issues as stated in the pre-trial order, the jury instructions, the

as to defendant DePinto's liability to plaintiffs. The appellate opinion affirming that judgment makes it clear beyond question." (T.R. 140)

No doubt the trial Judge felt that his decision with respect to DePinto's claim for indemnity was supported by the opinion of this Court in DePinto v. Provident Security Life Ins. Co., 374 F.2d 37 (9 Cir. 1967), reading, in part:

"Late on the afternoon of October 17, 1957, American was organized, with Sabo, Pegram, Landoe, Roslyn B. Croydon, John D. Ballantyne and Niesz as the incorporators and directors. On October 18, 1957, Kelly agreed in writing to sell 35,149.89 shares of United stock to American for $325,136.48. At 3:30 p.m. that afternoon, a meeting of the board of directors of American was held. The minutes of that meeting recite that Croydon reported that negotiations had been completed for the acquisition of approximately forty percent of the shares of United, 'representing working control,' to be paid for partly in cash and partly in assets which could be acquired from United in payment of Class A shares of American.

"The directors of American thereupon adopted the four resolutions noted in the margin.[3] As indicated by these resolutions, American had arranged to sell to United 35,000 Class A common shares of American stock. The resolutions by American also indicate that in part payment for the 35,149.89 shares of United which Kelly was selling to American, Kelly was to receive the assets of United which American had acquired in payment for American stock.

"A meeting of the board of directors of United was held at 4:00 p.m. on October 18, 1957. At that meeting, with directors DePinto, N. J. Dunn and J. L. Jenkins in attendance, a resolution was adopted accepting the resignations of A. Thomas Duncan, Patrick J. Kelly, E. Hartley Brown, T. J. Flaherty and Spence Reese, as directors of United. This resolution further provided that Niesz, Ballantyne, Croydon, Sabo, Pegram and Harvey T. Goss be elected as directors of United.

"A second meeting of United's directors was held at 4:15 p.m. on that day, with only four of the directors (Niesz, Ballantyne, Croydon and Goss) in attendance. Three of these (Niesz, Ballantyne and Croydon) were

in American's board meeting held at 3:30 p.m. earlier that afternoon.

"The minutes of the 4:15 p.m. meeting of United first recite that Dunn, Jenkins and DePinto had previously tendered their resignations as directors, and record the adoption of a motion accepting these resignations. According to the minutes, two resolutions were then adopted, the effect of which was to subscribe for 35,000 shares of Class A common shares of American at ten dollars per share. All but 4,200 of these shares were to be purchased immediately for a total consideration of $308,000, consisting of United's secured and unsecured promissory notes, bonds, certificates of deposit and cash.

"On the day these transactions took place, American did not have a permit from the Securities Division of the Arizona Corporation Commission authorizing the issuance of shares of its non-voting common stock to United. At this time both Kelly and Croydon knew that Kelly was to be paid with $308,000 in assets of United for his sale to American of his stock in United. United was in a deficit condition on October 17, 1957. The 30,800

on October 18, 1957, apparently had no fair market value, which resulted in increasing United's existing deficit by $308,000.

* * * *

"The jury verdict represents a finding that a proximate cause of United's loss on October 18, 1957, was DePinto's negligence in failing to keep himself informed concerning United's affairs, in failing to determine whether the new group would obtain control of United in a manner which would prejudice that company, and in failing to take effective action to thwart the plan which, upon a reasonable investigation, would have been shown to be contrary to the best interests of United."

This Court decided that the jury was warranted in finding that DePinto's negligence was a proximate cause of the loss sustained by United as a result of the October 18, 1957 transaction. The trial Court was quick to conclude that such negligence must give rise to primary liability. This is not the rule.

The landmark Arizona decision is the case of Busy Bee Buffet v. Ferrell, 82 Ariz. 192, 310 P.2d 817. The Busy Bee Buffet, a corporation, operated a bar on the West side of certain premises and leased the East side to a partnership for the purpose of operating a restaurant thereon. A passageway at the

rear of the premises was used by both the buffet and the restaurant for the delivery of groceries to the restaurant and liquor to the buffet. A trapdoor was situated in the passageway and led to a basement used by both the restaurant and the buffet. One of the partners left the trapdoor open and, while attempting to make a delivery of beer to the buffet, the plaintiff, Ferrell, fell through the trapdoor and was injured. Ferrell obtained a judgment against both the corporation and the partnership and, at the same time, the corporation was given judgment for a like amount against the partnership. In discussing the liability of the corporation to Ferrell, the Supreme Court of Arizona said:

> "Under such circumstances the very existence of the trap door (without adequate guard rails or warnings of some kind), and the certainty that it would be open at times, constituted a potential danger at all times and an actual danger when open and unguarded. Therefore, the Buffet owed the duty to its invitees to adequately warn them of the existence and nature of such potential or actual danger. This it did not do. In addition to the testimony of Ferrell two witnesses testified they had delivered liquors through that passageway for a long period of time prior to Ferrell's injury and did not know that the wooden

covering lying across the concrete passageway was a trap door, or that there was a basement beneath it. All of the evidence is to the effect that the passageway was dimly lighted at the point where the trap door is located. We therefore hold that the court did not err in denying the Buffet's motion for judgment n.o.v. or, in the alternative, for a new trial."

In discussing the question of whether or not the corporation was entitled to indemnity from the partnership, the Supreme Court of Arizona said:

"We have shown above that the Buffet was guilty of negligence in failing to maintain the passageway in a reasonably safe condition for those making deliveries to it. We believe we should now discuss briefly the difference between the character and kind of negligence of the Buffet and that of Pastis. The term 'difference in kind and character' between the negligence of the Buffet and Pastis must not be confused with 'comparative negligence' or 'degrees of negligence.'

"It will be observed that the Buffet owed a positive legal duty to Ferrell to

keep the passageway reasonably safe for his use in making deliveries of beverages to it. So long however as the trap door was closed the basement beneath the passageway constituted no actual peril whatever. It was only when the trap door was open and inadequately guarded by failure to place proper barricades on each side of the opening, or something equally effective, that the actual danger to Ferrell was created. The Buffet was guilty of no active fault in creating the danger to Ferrell. Its negligence was passive or static. Its negligence was incapable of producing injury to any one at that time except through the active negligence of another. Pastis, in opening the trap door and leaving it unguarded, was the immediate cause of Ferrell falling through the opening and sustaining the injuries which form the basis of this litigation.

"It will be further observed that the liability of the Buffet to Ferrell is based upon an entirely different kind or character of wrong than that of Pastis. The liability of the Buffet is based upon its positive legal

duty to Ferrell to maintain the passageway in a reasonably safe condition for his use. It did not actively participate in the wrong which was the immediate cause of the injury to Ferrell. It was Pastis, a co-tenant with the Buffet, who, acting independently and without the knowledge of the Buffet, primarily caused the injury to Ferrell. It was his act in opening the trap door to the basement and leaving it unguarded which rendered the passageway unsafe for the use of Ferrell. His act did more than render it unsafe, it rendered it highly dangerous. It constituted gross and wilful negligence for which he was liable to Ferrell either as an invitee or a licensee. There was no dispute in the evidence on this point and reasonable men could draw no other inference from his act. Scott v. Scott, 75 Ariz. 116, 252 P.2d 571.

"In the light of these facts Pastis became primarily liable to Ferrell for the injuries he sustained and the Buffet is only secondarily liable. Blakely Oil Co. v. Crowder Cattle Co., 80 Ariz. 72, 292 P.2d 842; Builders Supply Co. v. McCabe,

366 Pa. 322, 77 A.2d 368, 24 A.L.R.2d 319, 323, 324; Fidelity & Casualty Co. of New York v. Federal Express, 6 Cir., 136 F.2d 35, 40. In the latter case the court points out the different factual situations in which the issue of primary and secondary liability may arise as between joint tort-feasors. It reads as follows:

"'From the cases and authorities to which reference has been heretofore made, the rule has been variously expressed that, as between joint tort-feasors, the issue of primary and secondary liability only arises: where they are not in pari delicto as between themselves; where one tort-feasor is not guilty of the same fault as the other, although both are liable to the injured party; where the negligence of the joint tort-feasors is not of the same character; where they do not commit the same wrong; where one is not a wrongdoer as between himself and the other; where there is no joint action in causing the injury; where they do not act together in committing the wrongful act; where one is not guilty

> of the same tortious delinquency; where the negligence of one is only imputed or constructive; where one is liable by construction of law on account of some omission of a duty of protection or care; and where one tort-feasor is liable to a third party by reason of a legal relationship to the other tort-feasor, or because of a condition brought about by the latter, in the creation of which the other has not joined. It is also said that where one is the "active" tort-feasor, and the other, the "passive"--or where the primary or active fault rests upon one tort-feasor, he, as the active tort-feasor, is liable to the other. But this is only another way of expressing the same rule as otherwise above stated. It does not mean that the joint tort-feasor whose negligence is the lesser can have indemnity from the other for damages caused by the concurring negligent act of both.'
>
> "We hold the facts in the instant case fall squarely within the above category of joint torts creating a primary and secondary liability."

In the case of Merritt-Chapman & Scott Corp. v. Frazier, 289 F.2d 849 (9 Cir. 1961), this Court adverted to the right of a

"Defendant was referring to the doctrine recognized by this court in United States v. Rothschild Intern. Stev. Co., 9 Cir. 1950, 183 F.2d 181. This right of indemnity exists in Arizona; Busy Bee Buffet v. Ferrell, 1957, 82 Ariz. 192, 310 P.2d 817. We, of course, express no opinion whether defendant's claim met these requirements or was valid."

It cannot reasonably be disputed that Sabo, Pegram and Landoe were primarily liable for the loss sustained by United as the result of the October 18, 1957 transaction. They were incorporators and directors of American. (T.R. 44) Sabo and Pegram were directors of United. (T.R. 52) It was their conduct which caused United to transfer $314,794.19 of its assets to American in exchange for the 30,800 shares of the common stock of American. As pointed out by this Court:

"On the day these transactions took place, American did not have a permit from the Securities Division of the Arizona Corporation Commission authorizing the issuance of shares of its non-voting common stock to United."

This was illegal. A.R.S. § 44-1841, et seq. Furthermore, as stated by the trial Judge in his instructions to the jury, "The act of United in purchasing the American stock was illegal." (T.R. 584-586) See A.R.S. §§ 20-532, 20-538 and 20-546.

It is undisputed that DePinto was not a director of United at the time of the commission of acts by Sabo, Pegram and Landoe which resulted in loss to United. He did not participate

in, acquiesce in, ratify, authorize, have knowledge of, or have anything whatsoever to do with the exchange of United's assets for stock in American. As pointed out by this Court, DePinto's only negligence was his failure to do anything with respect to the transaction of October 18, 1957. Having in mind the Busy Bee Buffet case and, particularly, the quote from Fidelity and Casualty Co. of New York v. Federal Express, it is clear that, with respect to the relationship of DePinto with the cross-defendants:

(a) they were not in pari delicto;

(b) DePinto was not guilty of the same fault;

(c) the negligence of DePinto was not of the same character;

(d) they did not commit the same wrong;

(e) DePinto was not a wrongdoer as between himself and the others;

(f) there was no joint action in causing injury;

(g) DePinto did not act with the others in committing a wrongful act;

(h) DePinto was not guilty of the same tortious delinquency;

(i) the negligence of DePinto was passive, while the negligence of the others was active.

The liability of DePinto for the loss to United is secondary. The liability of Sabo, Pegram and Landoe for the loss to United is primary. Under the law of Arizona, DePinto is entitled to indemnity from Sabo, Pegram and Landoe. The judgments in favor

of Sabo, Pegram and Landoe must be reversed and DePinto allowed to proceed upon his cross-claim

Respectfully submitted,

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By _____
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I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

_____
Joseph S. Jenckes, Jr.

A true copy of the foregoing Opening Brief of Appellant, Angus J. DePinto served, via First Class Airmail, postage prepaid, this 15th day of February, 1968, upon:

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